engage primarily in home shopping or infomercial programming.

1. Market Share

The Commission seeks comment on the size of the market share necessary to obtain a small market/minimum voices waiver. *Second FNOPR* at ¶48. It also asks whether, if after a waiver is granted and the joint ownership results in the stations developing large market shares, the Commission should terminate the waiver when the owner seeks to assign or transfer the licenses. *Id.*

As a general matter, setting waiver standards by market share sets a dangerous precedent for a Commission that purportedly seeks the widest viewpoint and program diversity. Most often, those stations with the *lowest* market share serve unmet needs or underserved communities. Moreover, depending on the demographics and the size of the market, a small market share may well be enough for a broadcaster to be profitable, while filling important niche needs at the same time. If the Commission's concern is with struggling small broadcasters, it should look only to revenues, and not market share. However, if the Commission does decide to grant these waivers, it should terminate the waiver when the owner seeks to assign or transfer the licenses ***regardless of the market share of the stations.***

2. Minimum Number of Voices

The Commission asks if it should count only broadcast television outlets in determining the minimum number of voices in a market necessary for a small market/minimum voices waiver. *Second FNOPR* at ¶52. The Commission also seeks comment on whether cable, DBS, OVS, and on-line services should be counted as independent voices. *Id.*

The Commission should not count paid media such as cable, DBS and OVS as compara-

ble voices for the purposes of assessing the diversity of voices in a market. Broadcast television is unique in that it is required by law to serve each and every American with free programming that meets community needs.[22] With the exception of a handful of locally originated cable channels located mostly in large urban areas, none of the other technologies provide ***local*** news and public affairs programming.

Nor do any of the newer video services have the universal reach and accessibility of broadcasting. DBS serves just 4 million households, MMDS one million, and OVS a mere 3,000, compared to 97 million television households. *See Third Annual Report to Congress on Cable Competition*, No. CS 97-1 (released January 2, 1997). Thus, they do not nearly approach being mass media capable of serving the important function of educating the electorate and/or providing a nationwide forum in which public debate on issues of public importance can take place.

On-line services, which have become the new "diversity" darling of those who would loosen ownership regulations, do not even merit comparison. These services are not a mass medium - they are point-to-point services intended to reach niche audiences with narrowly targeted information. Their viability as an advertiser-supported medium is unproven. Nor are they universal or local. Moreover, much on-line content is duplicative of material carried on existing video or print media. Many broadcasters are subscribing to *City Web* and similar on-line services designed to integrate and extend the broadcasters' programming base, not to compete

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[22]Indeed, according to the FCC: "Television is 1) more immediate than newspapers; 2) has public interest obligations not shared by newspapers; 3) has more visual impact than either newspapers or radio; and 4) is used by more people as their primary news source than are either radio or newspapers. *TV Ownership FNOPR* at ¶74.

with it.

Nor should broadcast radio be included in the number of voices for diversity purposes. Radio has become a niche medium, as opposed to a mass medium, and utilizes a very different advertising base. While it may be true, as the Commission notes, that counting only broadcast television voices would limit waivers under this criteria, *Second FNOPR* at ¶52, waivers are intended to be narrow. Otherwise, there is little sense in having a rule in the first place.

F. Public Interest and Unmet Needs

The Commission seeks comment on situations in which it should grant a waiver if the applicant demonstrates that the public interest benefits that will flow from a waiver would include public interest programming that would not be provided were the stations owned separately. *Second FNOPR* at ¶54. Specifically, the FCC asks (1) how it should consider public interest programming enhancements in granting permanent waivers, *id.* and (2) whether it should rely only on traditional public interest programming (such as news, public affairs or access for political candidates) or permit broadcasters to identify additional types of programming (such as programming that serves the needs of an underserved segment of the local market). *Id.* at 55. The Commission also asks whether it should follow up on the representations made by licensees in their waiver requests. *Id.* Lastly, the Commission asks, whether "it would be preferable to consider this waiver criterion, ***if at all***, only in conjunction with one or more of the other criteria discussed above." *Id.* [Emphasis added.]

The fact that the Commission even asks some of the questions listed above is remarkable in and of itself. It asks whether it should give a special waiver to a broadcasters based only on the fact that the broadcaster is doing the ***bare minimum*** of what it is required by law to do, *i.e.*,

news, public affairs and candidate access. The underlying assumption is that a not-insignificant number of broadcasters do not presently fulfill their legal obligations in exchange upon which their free license is conditioned. It would be ludicrous to reward broadcasters for doing merely what they are supposed to.

Even more incredible is the Commission's question whether it should consider the public interest benefits of a waiver, ***"at all."*** The Commission is mandated by law to determine whether the "public interest, convenience and necessity" are met for every waiver it grants. 47 USC §309. In the ownership context, that determination has always included an inquiry into the type of community oriented news, public affairs and other special programming would redound from grant of a waiver. *See, e.g*, ***Brissette Broadcasting***, 11 FCC Rcd 6319 (1996) (commitment to expand newscasts on its television stations by at least one hour each weekday; expand community programming with emphasis on local live coverage of community events; utilization of closed-captioning technology; use of an educational consultant to help develop additional, meaningful programming for various age groups in the community); *Station Partners*, 10 FCC Rcd 12383 (1995) (increasing locally originated news programming on the acquired station from 14 1/2 hours to 27 hours per week, including an increase of at least 50 percent in the amount of locally originated news reports of special interest to New Jersey).

Therefore, to the extent that the Commission grants any waivers of the duopoly rule, it must require broadcasters to make specific, enforceable promises as to the public interest program benefits that will redound from such a grant.[23] These public interest benefits must

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[23]Commenters, however, would not support a "public interest" waiver alone - to the extent the Commission adopts any of the other criteria listed above, it should be coupled with a compelling public interest showing as well.

not merely be what a broadcaster is already required to provide to renew its license. They must consist of more - such as programming that meets the needs of an underserved segment of the market, or other public interest programming that would not otherwise be provided without grant of a waiver.

To ensure that broadcasters comply with the promises under which they have obtained the waiver, the Commission should require biennial reports from broadcasters identifying the specific programming they have provided that meets those promises. Moreover, the agency should require broadcasters to notify the Commission, in writing, when it has made changes in programming or otherwise that do not comply with the terms upon which the waiver was granted. In the event such changes occur, a broadcaster should be subject to an early license renewal.

Moreover, and in any event, the Commission should never permit any waiver of the duopoly rule if one or both of the stations will be used predominantly (*i.e.*, more than 12 hours a day) for the broadcast of long form commercial programming such as home shopping or infomercials. There will be no public benefit in either program or viewpoint diversity if a duopoly is used to hawk consumer goods 24 hours a day. Full time home shopping stations do not promote localism, civic discourse, education or any of the other values that make broadcasting special. *See generally,* Comments and Reply Comments of the Center for the Study of Commercialism in MM Docket 93-8, filed March 30, 1993 and April 27, 1993, respectively. Therefore, they should not be entitled to special FCC waivers based on those values.

G. Interim Waiver Policy

The Commission requests comment on its decision to "generally grant waivers of the television duopoly rule, ***conditioned on coming into compliance with the requirements ultimately***

adopted in this proceeding...where the television stations seeking common ownership are in different DMAS with no overlapping Grade A signal contours." *Second FNOPR* at ¶57 [Emphasis added.] Because the Commission has tentatively concluded that the record here supports changing the standard in this manner, it believes that granting these waivers "will [not] adversely affect our competition and diversity goals in the interim." *Id.*

The Commission should suspend its interim waiver policy immediately, and should not allow its prior grant of these waivers to influence its ultimate decision concerning the parameters of the duopoly rule. Permitting waivers of this kind creates stakeholders in the outcome of this proceeding - stakeholders who will now argue that they will suffer great economic harm if the Commission does not adopt the DMA/Grade A standard. Although the Commission goes through the motions of stating that these waivers are "conditioned on coming into compliance with the requirements ultimately adopted in this proceeding...," it appears that it has already made up its mind that the DMA/Grade A standard will not harm diversity or competition. This violates the tenents of the Administrative Procedure Act, which instructs agencies to provide the public an opportunity for comment before adopting a rule. 5 USC §553.

III. EXISTING LMAs SHOULD NOT BE GRANDFATHERED EXCEPT IN COMPELLING CIRCUMSTANCES.

The Commission asks a series of questions regarding the treatment of television local marketing agreements (LMAs). *Second FNOPR* ¶¶80-91. The Commission first seeks comment as to how many television LMAs exist, the market they cover, the length of the contract and any other relevant information. *Id.* at ¶87. It then asks whether LMAs should be grandfathered in the event that they are found to be attributable for purposes of the ownership rules in a companion proceeding, and after what date grandfathering is appropriate. *Id.* Finally, the Commission asks

whether it should permit LMAs to be transferred or renewed. *Id.* at ¶91.

MAP *et al.'s* position on television LMAs is the same as it has been in the six years since Commenter MAP first brought the matter to the Commission's attention in 1991 - they are an unlawful evasion of the ownership rules that runs afoul of every notion of trusteeship. *See, e.g.*, Reply Comments of Telecommunications Research and Action Center, *et al.* filed in MM Docket No. 91-221, December 19, 1991 at 15-22; Reply Comments of Telecommunications Research and Action Center, *et al.* filed in MM Docket No. 91-221, September 23, 1992 at 20-27. This inquiry on LMAs is long, long overdue. Despite repeated public and private entreaties from MAP to address television LMAs since 1991, the Commission has stubbornly refused to do so until now. This purposeful inaction has permitted these arguably illegal arrangements to flourish to such a point that ending this practice becomes even more difficult. That the Commission now seeks comment on how many and what type of LMAs exist is indelible proof that the agency has been completely derelict in its duties.[24]

Equally as troubling is the assumption in the *Second FNOPR* that the Commission has *ever* approved of LMAs in the context of radio. What was deemed attributable in *Revision of Radio Rules and Policies*, 7 FCC Rcd 2755 (1992), *clarified*, 7 FCC Rcd 6387 (1992), *further clarified*, 9 FCCRcd 7183 (1994) was "time brokerage" of 15% or more of the brokered stations programming. The Commission defined "time brokerage" at that time as a

> a type of joint venture that generally involves the sale by a licensee of "discrete blocks of time to a 'broker' who then supplies the programming to fill that time and sells the commercial spot announcements to support it.

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[24]The Commission need only look to the January 27, 1997 issue of Broadcasting and Cable to see the pervasiveness of LMAs in the top 100 markets. Of those it could find, there were 40 LMAs in 35 markets. "The world of LMAs," *Broadcasting & Cable*, January 27, 1997 at 5.

Revision of Radio Rules and Policies, 7 FCC Rcd at 2784.[25] LMAs are a completely different animal. They consist of the wholesale abrogation of control of a station by the licensee to the programmer, who manages every aspect of the station - including access to candidates, local programming and children's educational programming obligations. The licensee may have a mailbox, a studio and a public file, but any claim that it has control over its station stretches the limits of credulity.

MAP *et al.* therefore call on the Commission to right the wrong it has perpetuated for more than five years in this proceeding, and abolish LMAs for good. Reduced to their essence, LMAs are an easy way to evade the ownership rules. *See* Comments of MAP, *et al.* filed today in MM Docket Nos. 94-150, 92-51, 87-154 at 20-22. They are anti-diversity, anti-competitive, and constitute what is essentially a transfer of control in violation of 47 USC §310(d). *Id.* [26] Therefore, regardless of whether or not the Commission relaxes the duopoly rule in this proceeding, it should do for LMAs what it did for broadcast lotteries - in the immortal words of then-Commissioner Duggan, give them "a decent burial." *Amendment of Commission's Rules to Allow the Selection from Among Competing Applicants for New AM, FM and Television Stations By Random Selection (Lottery),* 5 FCCRcd at 4002 (Separate Statement of Commissioner Ervin

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[25]Several of the commenters supporting time brokerage in that docket compared the practice to network affiliation agreements, which the Commission described as "a variant of time brokerage whereby 'the local affiliate sells time to the network in exchange for desirable programming, station compensation, and the opportunity to place local commercials within popular national programs." *Revision of Radio Rules and Policies, supra*, at 2784-5 n. 113

[26]In addition, while it does not implicate the ownership rules, LMAs can be used by non-licensees who never undergo the Commission's character scrutiny - imagine that a convicted child abuser, under the FCC's approach, can supply programming to meet the educational and informational needs of children under the Children's Television Act of 1990!

S. Duggan).

A. Grandfathering

For the above and other reasons, the Commission should not grandfather existing television LMAs entered into prior to the *Revision of Radio Rules and Policies Notice of Proposed Rulemaking*, 6 FCCRcd 3275 (1991). While MAP *et al.* believe that these arrangements have always, and continue to, violate the Communications Act, the Commission appeared to give its tacit approval to these arrangements up until that time. The Commission's proposed grandfather date, *i.e.*, before the adoption date of the *Second Further NOPR*, is unconscionably late. Even if one could plausibly argue that notice about radio LMAs was not applicable to television, there is no excuse for grandfathering any LMAs entered into after adoption of the *TV Ownership FNOPR*.

The Commission correctly construes the plain language of Section 202(g) of the 1996 as giving it authority to declare LMAs attributable and to decide whether to grandfather them. But its concern about the language in the Conference Report is misplaced. First, the plain language of the statute takes precedence over Report language. Moreover, the Conference Report language allows only those LMAs that are "consistent with the Commission's rules" or that were "otherwise in compliance with Commission regulations on the date of enactment." As discussed above, LMAs have always violated the Commission's regulation and policy with regards to unauthorized transfers of control, and indeed, the Commission has never ruled otherwise. At the very least, the Conference Report language would permit the Commission not to grandfather

any LMA that would create a duopoly in the event ownership is attributed to the programmer.[27]

B. Renewal and Transferability

The Commission proposes that a new station owner, in the case of a transfer, be permitted to retain an LMA entered into before the grandfather date for the duration of the term even if it would otherwise violate the local ownership rules. *Second FNOPR* at ¶91. It also proposes to permit renewal or extension of the LMA only if it took place before the grandfathering date. *Id.*

If the Commission permits grandfathering, it should not also permit LMAs to transfer with a license. Unlike current LMA operators, a new station owner will not have invested any time or money in programming or administration. There is no Commission rule or policy that requires grandfathered interests to be transferable. Indeed, the agency's practice has been to the contrary. For example, those broadcast/newspaper combinations that were grandfathered after adoption of the broadcast/newspaper cross ownership restrictions were not made transferrable. *Second Report and Order*, supra, 50 FCC2d 1046, 1076.

Permitting LMA transfers reifies the status quo. Hopefully, whatever market conditions might justify permitting any LMA at all will improve to the point that a separate operation could be sustained. Transferable waivers would compound the sin of LMA's by first permitting unnecessary anti-competitive conditions to develop and then allowing them to continue even when they are no longer justifiable by any standard. At the least, such waivers must be reviewed at the time of transfer based on current conditions and in light of the transferee's other ownership

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[27]Under the "otherwise in compliance with the Commission's regulations on the date of enactment" would mean that the current rule's Grade B contour overlap prohibition would be operative.

interests and plans to meet the programming and reporting obligations discussed in Section II, F, *infra*.

Finally, to the extent that the Commission permits grandfathering at all, MAP *et al.* support the Commission's proposal to permit renewal or extension only if it takes place prior to the grandfathering date.

CONCLUSION

The Commission's review of its ownership policies offers the opportunity to ensure that American citizens may have access to a vibrant and diverse marketplace of ideas as we move towards a new and, perhaps, very different framework for distribution of information in the next century. New technologies may soon enable creation of a more well-informed electorate, and permit vastly increased public participation in self-governance. However, this prospect should not blind the Commission to the reality that different and better modes of distribution do not by themselves guarantee diversity; highly concentrated ownership of the mass media could negate the potential for enhancing democracy.

The greatest threat to realization of technology's full potential is the monopolization of sources of information prior to the evolution of new means of distribution. Thus, the Commission must employ content-neutral structural regulation of ownership that will permit development

of meaningful competition and maximal viewpoint diversity in the mass media.

Respectfully Submitted,

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